(1)

91-768

No.

In The

Supreme Court of the United States

October Term, 1991

EMIL CHRISTIAN GREMLICH,

Petitioner,

vs.

UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether *Feres v. United States,* 340 U.S. 135 (1950) would apply to the petitioner, who had been separated from active duty and who was injured while a passenger in a private automobile and who had originally been successfully treated for his injury by civilian doctors, may now claim damages for malpractice against an Army doctor, who, without any request by the petitioner, undertook to treat the petitioner, and while doing so, permanently rendered the petitioner both impotent and incontinent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE, CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 12, 1991.

OPINIONS BELOW

The memoradum opinion of the District Court for the Eastern District of Pennsylvania is unreported and is printed in Appendix A hereto, 1a, *infra*. The opinion of the Court of Appeals for the Third Circuit is unreported and is printed in Appendix B hereto, 3a, *infra*.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 12, 1991 and the petitioner filed a timely petition for rehearing. That petition was denied by the United States Court of Appeals for the Third Circuit on July 10, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. §§ 1346(b), 2671, *et seq.*

STATUTE INVOLVED

The statute involved is the Federal Tort Claims Act (28 U.S.C. §§ 2671, *et seq.*)

STATEMENT OF THE CASE

This action under the Federal Tort Claim Act (28 U.S.C. §§ 2671, *et seq.*) seeks damages for the permanent condition of impotence and incontinence which resulted from the malpractice of an Army physician who undertook to treat the petitioner who had been injured in a civilian automobile accident which occurred while the petitioner was in transit after the completion of his active duty status and was thousands of miles from his last assignment in Fort Chaffee, Arkansas. The accident occurred on October 27, 1957 and the petitioner had been released from duty on October 25, 1957.

The petitioner had been a passenger in a friend's automobile and suffered serious head injuries which required a craniotomy on November 5, 1957. He was then a patient in Citizens' General Hospital, New Kensington, Pennsylvania. Among his injuries was a torn urethra which was repaired by the civilian physician who sutured it in place and inserted a catheter, acting as a "splint", giving the urethra the opportunity to heal before being removed.

In December 1957, without either consulting with the petitioner, who was semi-conscious, or obtaining any authorization, the Army personnel appeared at Citizen's General Hospital and removed the petitioner to Valley Forge Army Hospital. Upon admission, an Army physician, in direct violation of the written instructions of the civilian physician, prematurely removed the catheter resulting in a series of needless surgery which was designed to attempt to repair the damage and which, by malpractice, resulted in the permanent condition of incontinence and impotence.

Were it not for the intermeddling of the Army physicians the petitioner would have had no permanent impotence nor incontinence, for the surgery performed by the civilian physicians, if left to heal, without intervention, would have resulted in total healing. The petitioner was then employed by the Bell Telephone Company of Pennsylvania and had more than adequate insurance coverage of his own without resort to the services of a military hospital. The actions of the respondent should not fall under the exception carved out by the *Feres* case and was not incident to the military service of the petitioner. The petitioner learned of this recently, when by chance he spoke to the civilian doctor who informed him of the medical history and first brought the issue of malpractice to the attention of the petitioner.

The motion of the United States to dismiss the complaint under Rule (b) for the lack of jurisdiction over the subject matter

and for failure to state a claim was granted by the District Court in reliance on *Feres v. United States,* 340 U.S. 135 (1950), since it was alleged the petitioner was on "active duty at the time of the accident".

The Court of Appeals for the Third Circuit affirmed the order of the District Court and likewise based its decision on the *Feres* case, ignoring the subsequent decisions of this Court which have severely modified and limited the reasoning of *Feres* and misapplying the facts to find the petitioners' injuries occurred were, "incident to his military service".

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals in the instant case follows the literal language of the case of *Feres v. United States,* 340 U.S. 135 (1950), but is in conflict with the reported decisions in the cases of *United States v. Brown,* 348 U.S. 110 (1954); *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), *Royonier v. United States,* 352.U.S. 315 (1957); *Muniz v. United States,* 374 U.S. 150 (1963); and *United States v. Johnson,* 107 S. Ct. 2063 (1987).

See also, Caruso, *An Analysis of the Evolution of the Supreme Court's Concept of the Federal Tort Claims Act,* 26 Fed. Bar. J. (1966). *Feres v. United States,* 340 U.S. 135 (1950) held that a serviceman on active duty could not recover under the Tort Claims Act for injuries incident to their service even though the language and history of the Act was persuasive of liability." (340 U.S. at 138).

Thereafter, in the case of *Muniz v. United States,* 374 U.S. 150 (1963), this Court explained the five following reasons which had been articulated in *Feres* for denying recovery:

> (1) the absence of an analogous or parallel liability, on the part of either an individual or a State; no individual has power to mobilize a militia, no State has been held liable to its militiamen; (2) the presence of a comprehensive compensation system for service personnel; (3) the dearth of private bills from the military; (4) the distinctly federal relationship of the soldier to his superiors and the Government, which should not be disturbed by state laws; and (5) the variations in state law to which soldiers would be subjected, involuntarily since they have no choice in where they go.

In *United States v. Brown,* 328 U.S. 110 (1954) the veteran recovered for injuries received in a veteran's hospital even though he was entitled to the same veteran's benefits as he would be if his injury had been incurred on active duty. In *Brooks v. United States,* 337 U.S. 49 (1949) the plaintiff was not barred from recovery even though he was also entitled to the same benefits as if he had been injured while not on furlough. Clearly, therefore, the Court eliminated the existence of veteran's benefits as a ground for denying recovery by military personnel on "active duty". Here, the petitioner was not even on "active duty" but had been relieved from his military obligation and was in transit to his home when the accident occurred.

In *United States v. Brown, supra,* the Court explained *Feres, supra,* on the ground that recovery by military personnel on active duty would "visit the Government with novel and unprecedented liabilities." 348 U.S. at 112-13.

Indian Towing Co. v. United States, 350 U.S. 61 (1955), held the United States liable under the Tort Claims Act for the Coast Guard's negligence in failing to keep a lighthouse burning causing plaintiff's tug to run aground, thus eliminating the absence of

analogous private liability as a ground for denying recovery. The majority dealt with *Feres* by observing that *Feres* held only that the "Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 350 U.S. at 69.

The inadequacy of the majority's "distinction" of *Feres* and the obvious conflict between *Indian Towing* and *Feres* was stressed in the dissenting opinion of Justice Reed, joined by Justices Burton, Clark and Minton, as follows:

> In Feres we talked of private liability and come to a conclusion which is contrary to that reached by the Court today.

350 U.S. at 75. In *Royonier v. United States,* 352 U.S. 312 (1957), the United States was held liable for negligence when the government employees failed to extinguish a forest fire which they started, thus further emphasizing the absence of parallel private liability as a basis for denying recovery. Although the majority opinion avoided the mention of *Feres*, the language and spirit of *Royonier* is in direct conflict and opposition to *Feres*. Whereas in *Feres,* 340 U.S. at 142, the Court had held:

> We find no parallel liability before, and we think no new one had been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.

In *Royonier,* 352 U.S. at 319, the Court held:

> It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its firefighters, but the very purpose

> of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

The specific holding of liability for the negligence of public firefighters in *Royonier* is in direct opposition to *Dalehite v. United States*, 346 U.S. 15 (1953). In *Dalehite*, the Court held:

> Our analysis of the question is determined by what was said in the Feres case. See 28 USC Sections 1346 and 2674. The Act, as was there stated limited United States liability to "the same manner and to the same as a private individual under like circumstances." 28 USC Section 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fires. *This case, then, is much stronger than Feres.*

(Emphasis added). It therefore necessarily follows that *Feres* had to fall with *Dalehite*.[1]

In the case of *Muniz v. United States*, 374 U.S. 150 (1963) where it was held that federal prisoners could sue under the Tort Claims Act for injuries sustained during their sentence, the Court dealt at length, with the various rationales articulated by *Feres*, holding that each of the rationales had been overruled by *Brown, Indian Towing*, or *Royonier, supra.*

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1. The lower courts have generally recognized that *Dalehite* is no longer valid since the *Indian Towing* and *Royonier* cases. *See United States v. Hunsucker*, 314 F.2d 98, 104 (9th Cir. 1962); *Blaber v. United States*, 332 F.2d 629, 631 (2d Cir. 1964); *Fair v. United States*, 234 F.2d 288, 292 (5th Cir. 1956).

In *Muniz,* the Court concluded its analysis of *Feres* by holding:

> "In the last analysis, Feres seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." [Citing United States v. Brown].

374 U.S. at 162. *Feres* had made no mention of the possible effect on military discipline of recovery by a serviceman. When this Court, in *Muniz* (374 U.S. 159), enumerated the five rationales articulated in *Feres* the effect on discipline was not among them. Thus, the line of cases culminating with *Muniz* marked a departure by this Court from the rationale on which the denial of recovery to servicemen is based, a departure which the Court of Appeals has totally ignored in the instant case.

It has been uniformly held that servicemen may recover for injury or death to their dependents as a result of maltreatment in military hospitals[2] while the dependents of a serviceman cannot recover for the serviceman's wrongful death in a military hospital resulting from the same type of negligence.[3] If an action for

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2. *Rogers v. United States,* 216 F. Supp. 1 (S.D. Ohio 1963); *Legare v. United States,* 195 F. Supp. 557 (S.D. Fla. 1961); *Grigalauskas v. United States,* 1043 F. Supp. 543 (D. Mass. 1951), *aff'd,* 195 F.2d 494 (1st Cir. 1952); *Herring v. United States,* 98 F. Supp. 69 (D. Colo. 1951); *Messer v. United States,* 95 F. Supp. 69 (D. Colo. 1951); *Costley v. United States,* 181 F.2d 723 (5th Cir. 1950).

3. *Van Sickel v. United States,* 285 F.2d 87 (9th Cir. 1960).

malpractice in a military hospital could interfere with discipline, it seems clear that the serviceman's recovery for the death of his dependent would actually pose more of a threat than the dependant's recovery for the death of a serviceman.

This becomes entirely irrational when we realize the serviceman's cause of action for the malpractice death of his wife would be based upon his marital relationship and then upon his service relationship. His wife on the other hand may not recover even though there is no necessary service relationship between her and the armed services.

We then should turn to the group of cases where liability has turned solely upon the question of whether the accident occurred on or off the military reservation. Those are the facts of this case and beginning with the rationale of *Feres* and the subsequent erosions, those cases become extremely important in determining whether the Third Circuit properly affirmed the decision in the lower court, to dismiss the claim as a matter of law. Thus, where military aircraft has crashed into the quarters of a serviceman, recovery has been allowed where the quarters were nearby, but off, the base,[4] but on the other hand, recovery has been denied where the aircraft crashed into quarters on the post.[5] This artificial line of distinction is not consonant with the stated rationale and the servicemen of this country deserve a more

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4. *Snyder v. United States*, 118 F. Supp. 585 (D. Md. 1954), *aff'd sub nom. United States v. Guyer*, 218 F.2d 266 (4th Cir. 1954); *Sapp v. United States*, 153 F. Supp. 496 (W.D. La. 1957).

5. *Orken v. United States*, 239 F.2d 850 (6th Cir. 1956); *Preferred Ins. Co. v. United States*, 222 F.2d 942 (9th Cir. 1955), *cert. denied*, 350 U.S. 837 (1955). *Cf.*, *Downes v. United States*, 249 F. Supp. 626 (E.D.N.C. 1965); *Nowotny v. Turner*, 203 F. Supp. 802 (M.D.N.C. 1962) and *Brown v. United States*, 99 F. Supp. 685 (S.D. W. Va. 1951), where recovery was allowed for injuries received on a military post.

sensible and understood distinction, consistent with the facts of their respective claims. [*See Gursley v United States,* 232 F. Supp. 614, 615 (D. Colo. 1964) where the District Court complains of the "confusion" engendered by *Brooks* and *Feres.]*

In Callaway v. Garber, 289 F.2d 171 (9th Cir. 1961), *cert. denied,* 308 U.S. 874 (1961), the Ninth Circuit denied recovery in the estate of an Air Force sergeant in a case involving a collision on a public highway between a private automobile being operated by a Navy recruiting officer in the line of duty and a private automobile in which plaintiff's decedent was traveling to temporary duty station from his permanent post. After noting the basic principle underlying *Feres* as modified by *Brown,* to be the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty the Court then observed:

> The instant case can find no shelter within those reasons, since the negligent and injured parties were members of different branches of the service and were engaged in entirely different and unconnected activities at the time of the accident.

289 F.2d at 173-4. However, in the absence of a definite explanation by this Court, the Ninth Circuit felt compelled to follow the literal holding of *Feres.*

On the other hand, in *Downes v. United States,* 249 F. Supp. 626, 628 (E.D.N.C. 1965), the court held:

> The real question then is a factual one; Was plaintiff performing duties of such a character as to undermine traditional concepts of military

> discipline if he were permitted to maintain a civil suit for injuries resulting therefrom?

In the case of *United States v. Johnson,* 107 S. Ct. 2063 (1987), this Court upheld *Feres* by the narrowest of margins and contained in that reported opinion are the dissents of Justices Brennan, Marshall, Stevens and Scalia who found fault with the application when the tort resulted from the negligence of an FAA radar operator (employed by the United States Government) which caused a Coast Guard helicopter to crash into a mountain in Hawaii. Justice Scalia stated that he could not "take comfort as the Court does", from Congress' failure to amend FTCA to overturn *Feres* and severely criticized the doctrine for its overextension of the legislated act and the inconsistencies resulting therefrom.

In the case of *Martin v. United States,* 404 F. Supp. 1240 (E.D. Pa. 1975), an "off duty" serviceman would not be able to recover, however the court stated:

> However, a serviceman is not precluded from recovery simply because he is a member of the military. Rather, the question is whether his injuries were incident to his military service . . . (citing Brooks [supra]) The crucial question is whether the injury was *incidental* to the decedent's military service, and here it plainly was. Although Moyer may have been stricken ill when he was "off duty", he was taken to a military hospital where the alleged malpractice took place. Had Moyer not been on active duty with the army, he would not have been eligible for care at that facility. Thus his injury was incident to his military status.

In the case here being considered, the petitioner was not on

"active duty" and there has been no explanation given why the Army intervened and directed the removal of the petitioner from the safe confines of a civilian hospital to an Army installation when the petitioner was clearly incapable of making such a request. It seems strange that the Army intervened in this case and took control over the medical care of an accident victim which had been discharged from active duty and was on his way home. Clearly, the Army did not take such interest in all those persons who were on the status of "active reserve" for to do so would mean that every person who was on "inactive reserve" status and became involved in an automobile accident, would immediately become under the care of the United States Government. Here, the record does not clearly disclose the reason for the exercise of control over the petitioner and since the physical and mental condition of the petitioner was in question that should be resolved upon remand.

The petitioner respectfully invites the Court's attention to the opinion in the case of *Schwager v. United States,* 326 F. Supp. 1081 (3rd Cir. 1971) which was the opinion of now Circuit Judge Becker, who stated, that in ***Brown*** there was an "obvious exception" to the *Feres* principle. He stated:

> By deciding that the discharged veteran was entitled to sue, it seems to us that the Court adhered to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty: - there is an obvious distinction between a serviceman, like Schwager, on active duty, and one who has been discharged from service, like Brown.

Here, we have no clear conception regarding what function caused the petitioner to become a patient in Valley Forge Military Hospital for he had been discharged two days before, was off

the base, in a private automobile and was injured while involved in a completely non-military accident. Further, his physical and mental condition precluded him from making an application for admission and he was being treated in a civilian facility and did not need military care. He was privately employed by the Bell Telephone Company and was covered under their medical plan and may have also been eligible for coverage under the applicable automobile insurance policies.

Under the cases, it seems clear he was not involved in activities which were incident to his military status and since the Army makes the assertion and has the burden to prove it, the case must at least be remanded for further evidence.

Further the evidence of the changing climate leading to the erosion of *Feres*, is that the House of Representatives passed H.R. 536, which would authorize recovery by the petitioner on the facts of this case. It is respectfully suggested that the rationale of *Feres* is irrational, has been subject to substantial criticism and has been attacked by both legal scholars and the Legislature. It is only a matter of time before it falls. While it continues to exist and may seem to be applicable in this case, it does not apply since the activities of the petitioner which resulted in the eventual malpractice upon him resulted from an incident which occurred after his discharge and did not subject him to the test of being "incident to his military status".

CONCLUSION

The petitioner was discharged from active duty and was in route to his home and hundreds of miles from the military installation when he was involved in a civilian automobile accident. His injuries included a severed urethra as well as severe head injuries which required multiple craniotomies. While in the civilian hospital and under the care of civilian doctors, he was successfully

treated and the severed urethra was re-connected and "splinted" with a catheter. He was convalescing when the Army, without explanation nor reason, intervened and without his permission, removed him to the Valley Forge Hospital where the attending Army physician, in direct disobedience to the directions given by the civilian physicians, prematurely removed the catheter and severed the urethra. The Army physician then attempted to correct his error and attempted to perform multiple corrective surgeries which only served to render the petitioner permanently impotent and incontinent since age 18.

After the petitioner discovered the malpractice and sued, the Army pleaded immunity as given by the *Feres* "doctrine". The District Court found *Feres* applied and the Third Circuit Court of Appeals has sustained the finding of the District Court.

The petitioner applies for a writ of certiorari averring that the facts do not warrant the application of *Feres* since his injury and predicate accident were not "incident to the service" as is required by the immunity exception created by *Feres*.

The petitioner prays for certiorari or alternatively for remand for the purpose of clarifying the record regarding his military status and why the Army intervened as an intermeddler when he had been discharged months before and had not requested nor required intervention.

Respectfully submitted,

STEPHEN M. FELDMAN
Attorney for Petitioner

APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 10, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1022

EMIL CHRISTIAN GREMLICH

Appellant

V.

UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY
Marsh, John O., Secretary

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil No. 89-8292)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *CHIEF JUDGE,* and BECKER, STAPLETON MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filled by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for a

rehearing, and a majority of the circuit judges of the circuit in regular active not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

s/ MORTON I. GREENBERG
Circuit Judge

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 6, 1991

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1022

EMIL CHRISTIAN GREMLICH

Appellant

V.

UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY
Marsh, John O. Secretary

On Appeal From the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil No. 89-8292)

District Judge: Honorable Edward N. Cahn

Submitted under Third Circuit Rule 12 (6)

June 6, 1991

Before: SLOVITER, *Chief Judge*, and GREENBERG and HIGGINBOTHAM, *Circuit Judges*

(Filed: June 12, 1991)

Appendix B

MEMORANDUM OPINION

GREENBERG, *Circuit Judge.*

Appellant Emil Christian Gremlich appeals from an order entered December 11, 1990, in accordance with the district court's memorandum opinion of December 10, 1990, in this action under the Federal Tort Claim Act. While we recognize that the result may seem harsh we are contrained after a most careful consideration of the record to agree with the district court that there is no escape from the conclusion that the injuries which Gremlich has sufferd must be regarded as incident to his military service. Thus, regardless of the tragic facts here we must affirm and do essentailly for the reasons set forth by the district court in the memorandum of December 10, 1990, *See United States v. Johnson,* 481 U.S. 681, 107 S.Ct. 2063 (1987); *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153 (1950); *Loughney v. United States,* 830 F.2d 186 (3rd Cir. 1988); *Estate of Martinelli v. United States,* 812 F.2d 872 (3rd Cir.) *cert. denied.* 484 U.S. 822, 108 S. Ct 82 (1987). If there is to be change in the law governing a case such as this it cannot come from this court. In the circumstances we need not comment on the strong argument which the government has advanced that, even if meritorious, this action would be barred by the statute of limitations.

The order of December 11, 1990, will be affirmed.

TO THE CLERK:

Please file the foregoing memorandum opinion.

s/ MORTON I. GREENBERG
Circuit Judge

APPENDIX C - MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 10, 1990

CIVIL ACTION

No. 89-8292

EMIL CHRISTIAN GREMLICH

v.

UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY

MEMORANDUM

CAHN, J. December 10, 1990

The defendants have filed a Motion to Dismiss or Alternatively, Motion for Summary Judgment for lack of jurisdiction, arguing that the plaintiff's claim under the Federal Tort Claims Act is barred by the *Feres* doctrine. The defendants' motion should be granted, because the medical malpractice allegedly committed by Army doctors against the plaintiff was incident to his military service. Neither the fact that the plaintiff was in the Army Reserves (as opposed to the Active Army), nor the fact that his accident occurred while he was on leave, is sufficient to remove his claim from the broad sweep of the "incident to service" rule in *Feres*. The dispositive fact is that the alleged medical malpractice occurred while the plaintiff was an active member of the United States Army Reserves.

Appendix C

I. BACKGROUND

The facts relevant to the current motion are largely undisputed. The plaintiff, Emil Christian Gremlich, brings this medical malpractice claim against the United States and the Department of the Army under the Federal Tort Claims Act ("FTCA" or "Act"), 28 U.S.C.A. § 1346(b), 2671 *et seq.* The plaintiff, who had enlisted in the United States Army Reserves ("Reserves" or "USAR") on March 4, 1957 for a six-year term, was seriously injured in an automobile accident while coming home on October 27, 1957 from active duty training ("ACDUTRA") in the Reserves. At the time of the accident, the plaintiff was on active duty in the Reserves; he was released to his reserve unit on October 28, 1957.

The plaintiff was first treated for injuries in a civilian hospital. On December 12, 1957 the plaintiff was transferred to Valley Forge Army Hospital, where he was treated by military personnel. The plaintiff alleges that his medical treatment by the military personnel at Valley Forge Army Hospital was negligent and that such negligence caused him incontinence and impotence. The alleged malpractice occurred while the plaintiff was on reserve status in the Reserves.[1] During his hospitalization from October 28, 1957 until May 27, 1959, the plaintiff received pay, allowances, and hospital benefits provided to members of the Regular Army under 10 U.S.C.A. § 3687 and § 3721.

The Defendants' motion argues that the plaintiff's medical

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1. The Government explains that courts often refer inaccurately to reserve status in the Reserves as "inactive" status in order to distinguish it from active duty. *See* Defendant's Motion to Dismiss or, Alternatively, Motion for Summary Judgment at 3 n.3.

treatment was incident to his service in the military, and, therefore, any malpractice committed against him is barred by the *Feres* doctrine. The Defendants maintain that *Feres* has been reinforced by subsequent cases. The plaintiff, by contrast, maintains that the alleged malpractice was not incident to service, because it occurred while he was off-base and while a passenger in a civilian automobile; furthermore, the plaintiff argues that because it was the Army which ordered him, against his will, to be transferred from a civilian hospital to Valley Forge Army Hospital, the Army "assumed the duty or providing competent treatment." Plaintiff's Memorandum Contra Defendant's Motion to Dismiss or Motion for Summary Judgment at 3. Alternatively, the plaintiff suggests that *Feres* has been eroded by subsequent cases and urges this court to hold *Feres* inapplicable to the facts of this case.

Under the FTCA this Court has exclusive jurisdiction of this action.[2]

II. DISCUSSION

A. Summary Judgment

Prior to the current motion under consideration, the

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2. The FTCA provides that with respect to claims accruing after January 1, 1945, the District Courts shall have exclusive jurisdiction of claims against the United States for injuries negligently caused by government employees acting within the scope of their employment under circumstances where the United States, if a private person, would be liable under the law of the place where the act or omission occurred. Military departments of the United States are specifically contemplated by the FTCA's statutory language, and members of the military forces are deemed to be employees of the government for liability purposes. 28 U.S.C.A. § 2671.

defendants filed an earlier motion for summary judgment which was denied. In ruling on the present motion, I have considered the military and medical records of the plaintiff presented by both parties in that earlier motion. Thus, the current motion shall be considered as one for summary judgment.

Under Fed. R. Civ. P. 56(c) summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This court must construe all facts and inferences in the light most favorable to the non-moving party. *Lyons v. United States Marshals,* 840 F.2d 202, 204 (3d Cir. 1988). The evidence so construed, however, the movant must prevail if there are no genuinely disputed issues of material fact that could support a verdict for the non-moving party end that would prove essential to the claim. *See, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49 (1986); *In re Paoli R.R. Yard PCB Litigation,* No. 88-1973, slip op. at 82 (3d Cir. Sept. 20, 1990). A genuine issue of material fact exists only if "reasonable jurors could find facts which demonstrated, by a preponderance of the evidence, that the nonmoving party is entitled to a verdict." *In re Paoli R.R. Yard PCB Litigation,* No. 88-1973, slip op. at 83. *See also Anderson,* 477 U.S. at 248; *Lyons,* 840 F.2d at 204.

B. The *Feres* Exception to the Federal Tort Claims Act

Before the *Feres* doctrine the Supreme Court declared that the FTCA permits claims by military personnel for injuries which would otherwise be actionable if they were not sustained "incident

to their service." *Brooks v. United States,* 337 U.S. 49 (1949) (two servicemen on furlough when their private automobile in which they were driving struck by U.S. Army truck being operated negligently by government employee entitled to sue under FTCA). In *Feres v. United States,* 340 U.S. 135 (1950), the Court considered three consolidated claims of service members against the United States, two of which alleged medical malpractice by Army doctors. 340 U.S. at 137. The Court decided in the negative the question reserved in *Brooks*: whether a serviceman or, after his death, his personal representative, may recover under the FTCA for injuries sustained incident to service. 340 U.S. at 146.

In denying such claims the Court reasoned that it would be anomalous if the Government's duty to supervise service members depended on the local law of the various states and that Congress had already provided for "no fault" compensations to service members through the Veterans' Administration. 340 U.S. at 142-46. In *United States v. Muniz,* 374 U.S. 150, 162 (1963), the Court added a third rationale for the *Feres* Doctrine:

> [the] peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty.

Accord United States v. Shearer, 473 U.S. 52, 57 (1985); *Loughney v. United States,* 839 F.2d 186, 187 (3d Cir. 1988).

The years following *Feres* have seen a consistent reaffirmation of its validity and an expansion of the definition of activities

incident to service.[3] *See United States v. Johnson*, 481 U.S. 681, 688-91 (1987) (all three rationales for *Feres* reaffirmed). It has been held that one returning to his home in his private vehicle on a travel status on the last day of a tour of active duty is acting in the line of duty within the meaning of 28 U.S.C. § 2671. 1 A.L.R. Fed. 592 (1969) (citing *Farmer v. United States*, 261 F. Supp. 750 (D.C. Iowa 1966), *aff'd*, 400 F.2d 107 (8th Cir. 1966)).Recently, Judge Troutman stated: "One of the most reliable indicia of [whether or not a plaintiff was engaged in an activity incident to military service] is to determine whether or not he was under orders or otherwise subject to military control at the

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3. This has occurred in spite of the Third Circuit's previously expressed dissatisfaction with applying the *Feres* doctrine to cases of medical malpractice. In *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir. 1973), *cert. denied*, 414 U.S. 879 (1973), the Court of Appeals stated; "If the matter were open to us we would be receptive to appellants' argument that *Feres* should be reconsidered, and perhaps restricted to injuries occurring directly in the course of service." The plaintiff notes that the Court of Appeals is not alone in its dislike of *Feres*. In *United States v. Johnson*, 481 U.S. 681 (1987), Justices Brennan, Marshall, and Stevens joined Justice Scalia's dissent in which he argued that "*Feres* was wrongly decided and deserves the widespread, almost universal criticism it receives." *Id.* at 700. Moreover, in 1989 the United States House of Representatives approved a bill (H.R. 536) which would have allowed recovery by service members for medical malpractice. *See* Plaintiff's Memorandum Contra Defendant's Motion to Dismiss or Motion for Summary Judgment at 4.

Nevertheless, a majority of the Supreme Court has consistently voted not only to reaffirm *Feres*, as in *Johnson*, but also to expand its scope. In *Shearer v. United States*, 723 F.2d 1102, 1105 (3d Cir. 1983), *rev'd*, 473 U.S. 52 (1985), the Court of Appeals allowed a widow of a serviceman to sue the Army for negligence in not restraining another serviceman from killing her husband, even though the Army knew he had already been convicted of homicide, because the murder occurred off-base and while the victim and the perpetrator were off-duty. The Supreme Court reversed, holding that the rationale of *Feres* applied even though Shearer's death was not directly related to his military service. 473 U.S. at 57.

time of the accident." *Cooper v. Perkiomen Airways, Ltd.*, 609 F. Supp. 969, 971 (E.D. Pa. 1985). By the plaintiff's own admission, he was under military orders when the alleged negligence occurred.

Moreover, medical treatment by military personnel on active members of the armed forces has consistently been held to be an activity incident to service and, hence, beyond the scope of the FTCA. *See Loughney v. United States,* 839 F.2d at 188 (medical malpractice claim by national guardsman barred by *Feres*); *Peluso v. United States,* 474 F.2d at 606 (death of national guardsman while on active duty with U.S. Army, allegedly resulting from malpractice by army doctors, not actionable under FTCA); *Henning v. United States,* 446 F.2d 774, 777 (3d Cir. 1971), *cert. denied,* 404 U.S. 1016 (1971) (medical malpractice by Army doctor on serviceman not actionable); *Ocello v. United States,* 685 F. Supp. 100, 102 (D. N.J. 1988) (fact that plaintiff denied disability benefits does not mean his injuries did not arise out of activities incident to service where claim was for medical malpractice against military doctors); *Martin v. United States,* 404 F. Supp. 1240, 1241 (E.D. Pa. 1975); *Southard v. United States,* 397 F. Supp. 409, 411 (E.D. Pa. 1975), *aff'd mem.*, 535 F.2d 1247 (3d Cir. 1975); *see also* 31 A.L.R. Fed. 158 (1977) ("Numerous cases have involved actions for injury to servicemen as the result of malpractice in a military hospital or other government medical facility. The courts have typically taken the position that the serviceman received government medical treatment solely because of his military status, and that accordingly injuries received therein must be deemed incident to service, for which government liability is precluded. In no such case has recovery been allowed (§ 22[a], infra), and a like result has been reached in cases involving elective medical procedures performed in a government facility at the request of the serviceman (§ 22[b], infra).")

This is true regardless of whether the plaintiff is a reservist, national guardsman, or a member of the Active Army. *Anderson v. United States*, 724 F.2d 608, 610 (8th Cir. 1983) (*Feres* doctrine applies to reservists); *Mattos v. United States*, 412 F.2d 793, 794 (9th Cir. 1969) (same); *Peluso*, 474 F.2d at 606 (*Feres* applies to national guardsmen); *Bloss v. United States*, 545 F. Supp. 102, 104 (N.D.N.Y. 1982) (same).[4]

III. CONCLUSION

Although the *Feres* doctrine often results in great hardship

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4. If the plaintiff's claim had arisen out of the accident itself, rather than from the medical treatment he received, the fact that he was on leave at the time of his automobile accident might have enabled him to sue under the FTCA. Thus, if Gremlich had been injured, as the plaintiff in *Brooks* had been, by a federal employee operating within the scope of his employment then the fact that Gremlich was on leave and returning home might have made his accident not incident to service. *See Kencht v. United States*, 242 F.2d 929, 930 (3rd Cir. 1957); *Cooper v. Perkiomen Airways, Ltd.*, 609 F. Supp. at 971; *but see United States v. Shearer*, 473 U.S. at 57 (situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions).

Similarly, if the plaintiff had been treated by the Army doctors after his military service had expired, he might also have had a cause of action under the Act. *See Henning v. United States*, 446 F.2d at 777 (*Feres* focuses not upon the time when the injury occurs or when the claim becomes actionable, but rather upon the time of, and the circumstances surrounding, the negligent act); *McGowan v. Scoggins*, 890 F.2d 128, 129 (9th Cir. 1988) (*Feres* inapplicable to claim by non-member of military for injuries that are not incident to current military service or who is not subject to the supervision of military personnel); *Watt v. United States*, 246 F. Supp. 386, 388 (S.D.N.Y. 1965) (injury sustained by retired serviceman while patient in Army hospital not incident to service); *but see Fass v. United States*, 191 F. Supp. 367, 369 (S.D.N.Y. 1961) (recovery denied to plaintiff's beneficiaries after his death in military aircraft crash, because the plaintiff was a licensee, not an invitee, aboard the aircraft).

to the plaintiff, its application has been mercilessly upheld by the Supreme Court. Under that doctrine's "incident to service" test, the Army doctors' alleged medical malpractice against the plaintiff was incident to service under the FTCA. Therefore, the plaintiff has no claim under the FTCA, and the defendants' motion for summary judgment must be granted.

An order follows.

BY THE COURT:

s/ Edward N. Cahn
Edward N. Cahn, J.

ENTERED: 12-12-90